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California Continuing Education of the Bar, California Criminal Law Practice, Vol. I 3

Kappler, I Indian Affairs-- Laws and Treaties 4

Kroeber, Handbook of Indians of California 4

United States Department of the Interior, Federal Indian Law 5

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

Petitioner, Paul Donahue, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the California Court of Appeal, First District, entered in this case on February 24, 1971.

OPINIONS BELOW

The opinion of the Court of Appeal of February 24, 1971, as modified on March 26, 1971, is reported at 15 Cal. App. 3d 557 and attached as Appendix A. The order and opinion of the California Superior Court for Humboldt County is unreported and attached as Appendix B. The order of the California Justice Court for the Klamath-Trinity Judicial District is unreported and attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeal was entered on February 24, 1970. The California Supreme Court denied a petition for hearing on April 29, 1971. (A copy of that order is attached as Appendix D.) This petition for a writ of certiorari is thus due on or before July 28, 1971. (American Railway Express Co. v. Levee, 263 U.S. 19 (1923).) Trial has been stayed during consideration of this petition. This court has jurisdiction pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does an Indian's lack of tribal permission to fish on an Indian reservation make his on-reservation fishing subject to state fishing laws?

STATUTES INVOLVED

California Fish and Game Code §§8603, 8686, and 12300 and 18 U.S.C. §§1162 are set out in Appendix E.

STATEMENT OF THE CASE

A misdemeanor complaint was filed on September 8, 1969 in the California Justice Court for the Klamath-Trinity Judicial District alleging that Paul Donahue violated Fish and Game Code sections 8603 and 8686 on September 6, 1969, by (1) assisting in operating a gill net on the Trinity River and (2) possessing a gill net with mesh larger than 1 3/4 inches in District 1 1/2 and in the Trinity Klamath River District.

On December 9, 1969, Mr. Donahue informed the justice court that (1) the alleged offenses occurred on the Hoopa Valley Indian Reservation, (2) he is a California Indian of three quarters Indian blood, and (3) he is not on the "official roll of the Hoopa Valley Tribe," although his wife and children are. Donahue argued by written memorandum that the justice court lacked jurisdiction because California has no jurisdiction over fishing by any Indian on the Hoopa Reservation[1]. Donahue requested the court

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1. That memorandum and all the pleadings filed in this case have assumed arguendo that only a member of the Hoopa Valley Tribe has a right to fish on the Hoopa Valley Reservation. Fishing by a Hoopa Indian on the Hoopa Reservation would, of course, have been clearly outside the justice court's jurisdiction. (California Fish & Game Code §12300; Elser v. Gill Net Number One, 246 Cal.App. 2d 30 (1966).)

to dismiss on its own motion pursuant to California Penal Code Section 1385.[2]

By letter of December 17, 1969, the justice court denied without opinion the request for dismissal. Mr. Donahue was required to plead to the complaint, and he entered a plea of not guilty to both charges. A jury trial was set for March 6, 1970.

On February 4, 1970, Donahue petitioned the Humboldt County Superior Court for an alternative writ of prohibition. The verified petition presented the facts set forth above and alleged lack of jurisdiction on the same grounds presented to the justice court.

By an order entered February 27, 1970, the superior court denied the petition.

Paul Donahue appealed to the California Court of Appeal. That court affirmed the order of the superior court. It ruled that "California has jurisdiction to prosecute persons not members of the Hoopa Tribe for violations of its [California's] Fish and Game Code on the Hoopa Reservation....[but] that permission to fish on the reservation given by tribal authorities to non-tribal Indians is a complete defense...."

On April 29, 1971, the California Supreme Court denied Paul Donahue's petition for a hearing.

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2. A demurrer was not possible, as the complaint does not show on its face that the alleged violations took place on the reservation. A motion under California Penal Code Section 995 was impossible, because that section applies only to proceedings begun by indictment or information, i.e. felonies. (California Continuing Education of the Bar, California Criminal Law Practice, Vol. I, §8.39.)

REASON FOR GRANTING THE WRIT

STATE REGULATION OF INDIAN FISHING ON INDIAN RESERVATIONS WOULD SERIOUSLY IMPINGE ON TRIBAL SOVEREIGNTY AND WOULD BE INCONSISTENT WITH PRIOR OPINIONS OF THIS COURT.

This court ruled prior to the adoption of 18 U.S.C. §1162 that state criminal laws are inapplicable to "offenses" committed on Indian reservations either by Indians or against Indians or property of Indians. (Donnelly v. United States, 228 U.S. 243, 271-272 (1913); Williams v. United States, 327 U.S. 711, 714-715, fn. 10 (1946).) No subsequent decision has altered those rulings for cases in which 18 U.S.C. §1162 is not controlling.

Two independent factors would therefore have barred California from regulating Paul Donahue's fishing on the Hoopa Reservation before 1953 (when 18 U.S.C. §1162 became law).

First, Mr. Donahue is an Indian within the meaning of Donnelly and Williams even though not an enrolled member of the Hoopa Valley Tribe. (United States v. Rogers, 45 U.S. 567, 573 (1846); Davis v. United States, 32 F.2d 860 (9th Cir. 1929).)

Second, any offense Paul Donahue may have committed would have been against Indian property, i.e. Indian fishing rights. The Executive Order of June 23, 1876, creating the Hoopa Valley Reservation set it apart for "Indian purposes." (I Kappler, Indian Affairs--Laws and Treaties 815 (1904).) Because the Indians of the area which became the reservation caught and consumed large quantities of fish (Kroeber, Handbook of Indians of California 84-86, 100, 132), the "Indian purposes" referred to include exclusive on-reservation fishing

rights (United States v. Sturgeon, 27 Fed. Cases No. 16413 (1879); cf. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)). Those exclusive fishing rights are, as the California Court of Appeal recognized, property of the tribe or tribes for whom the reservation was created not property of the state. (See Whitefoot v. United States, 293 F.2d 658, 663 (Ct. Cl. 1961), cert. denied 369 U.S. 818, Masson v. Sams, 5 F.2d 255, 258 (W.D. Wash. 1925).) The reservation, like any other sovereign, is the owner of the fish within its borders. At least before 18 U.S.C. §1162, the state could not have authorized anyone to fish on the reservation, and the Indians--as both sovereign and exclusive property owner--had the right to decide who would exercise the Indians' exclusive on-reservation fishing rights and how and when they would do so. (United States Department of the Interior, Federal Indian Law at 706-710, especially footnote 5 and the accompanying text (1958)). If others fished without the Indians' permission, the offense would have been against those Indians' rights just as it would have been had others fished with permission but in violation of tribal rules.

18 U.S.C. §1162 clearly did not alter the above described allocation of sovereign power with respect to fishing rights. While section 1162 granted California extensive criminal jurisdiction, that law expressly excluded any power to "deprive any Indian or Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to ... fishing or the control, licensing, or regulation thereof." The same restrictions on California's powers also flow from federal regulations, such as executive orders, recognizing Indian fishing rights. Metlakatla Indian Community v. Egan, 369 U.S. 45, 56-57 (1962), expressly rejected the contention that 18 U.S.C. §1162 allows

state regulation of on-reservation fishing rights afforded only be regulation.

Consequently, California has no power to deprive the Hoopa Reservation of the right afforded by the Executive Order of 1876 to control, license, and regulate fishing on the reservation. If the Indians want unrestricted fishing on the reservation that is their right, just as it would be the prerogative of the Nevada Legislature to have unrestricted fishing in Nevada. State laws and regulations prohibiting fishing or prohibiting fishing at certain times or by certain means would deprive the Indians of that right. Tribal inaction, such as having no ordinance for licensing of non-Hoopas, is not a cession to the state of the Indians' jurisdiction over fishing. (Arizona v. Turtle, 413 F.2d 683, 686, fn. 3 (9th Cir. 1969).) Not even a resolution of the tribal council purporting to give California jurisdiction would constitute such a cession. (Kennerly v. Montana District Court, 400 U.S. 423 (1971). California thus has no right to enforce its fishing laws against Paul Donahue or any other Indian who fishes on the Hoopa Reservation, and the California Justice Court lacks jurisdiction of this matter.[3]

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3. The decision in United States v. Sturgeon, 27 Fed. Cases 1357 means that the federal government, which is supreme in Indian affairs, can keep non-Hoopa Indians as well as non-Indians off the reservation. It does not mean that the state can impinge on the jurisdiction of the reservation and the federal government to keep off non-Hoopas.

CONCLUSION

Neither before nor after 18 U.S.C. §1162 was tribal authorization to fish at all relevant to state jurisdiction of on-reservation fishing. Unlicensed fishing on an Indian reservation is an offense, if at all, against the federal government and the tribe or tribes for which the reservation was created.

A decision to that effect will not leave a reservation prey to unwanted fishermen. The reservation may adopt a fishing ordinance and punish violators. Also, the federal government may under 18 U.S.C. §1165 fine and imprison those who go onto the reservation to fish without authorization. The federal government may even deputize members of the reservation or state game wardens to enforce the provisions of section 1165.

This court should uphold the integrity of Indian reservations by granting this petition and reversing the decision of the California Court of Appeal.

July 24, 1971

Respectfully submitted,

GEORGE F. DUKE
RICHARD B. COLLINS, JR.
LEE J. SCLAR
WILLIAM P. LAMB
CALIFORNIA INDIAN LEGAL SERVICES

By _____
George F. Duke

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

PAUL DONAHUE, Plaintiff and Appellant vs. CALIFORNIA JUSTICE COURT FOR THE KLAMATH TRINITY JUCICIAL DISTRICT, Defendant, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest and Respondent.	1 Civil 28294 Filed: Feb. 24, 1971 As Modified: Mar. 26, 1971

HAROLD C. BROWN, Associate Justice.

This is an appeal from the order denying a petition for a writ of prohibition by the Superior Court of Humboldt County seeking to prohibit the Klamath Trinity Judicial District of Humboldt County from proceeding with the trial of appellant who is charged with violating California Fish and Game Code, sections 8603 and 8686 (possession and fishing with a gill net with a mesh larger than 1 3/4 inches).

When appellant was arrested for violating the Fish and Game Code, he was fishing on a river within the Hoopa Indian Reservation. The Fish and Game Code provides that it is not applicable to California Indians whose names are inscribed on the tribal rolls while on the reservations of such tribe. (Fish & Game Code, § 12300.) Appellant is an Indian but his name does not appear on the tribal rolls of

the Hoopa Valley Tribe, although his wife and his children's names are inscribed on the official rolls.

Two questions are before us: First, did the act of Congress of April 8, 1864 and the Order of President Ulysses S. Grant of June 23, 1876 (which acts created the Hoopa Indian Reservation) and U. S. Public Law 280 (18 U.S.C.A. § 1162, which transferred the basic law enforcement and criminal jurisdiction from the U.S. Government to the state) authorize the state to prosecute an Indian who is not a member of the Hoopa Tribe from fishing on its reservation in a manner violative of the California Fish and Game Code? Second, did Public Law 280 prohibit California from depriving the Hoopa Tribe of the right to authorize non-Hoopa Indians to fish on its reservation with immunity from the provisions of the California Fish and Game Code?

We have concluded that both questions must be answered in the affirmative.

The property rights of the Hoopa Indian Tribe were established by the Executive Order of President Ulysses S. Grant on June 23, 1876. The order provided that the descrived land was set aside for Indian purposes. (Kappler, "Indian Affairs, Laws and Treaties, " Vol. 1, p. 815; see also Elser v. Gill Net Number One, 246 Cal. App. 2d 30, 54 Cal. Rptr. 568; Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820, for historical background of establishment of the Hoopa Reservation.)

In 1953, the basic duty of law enforcement and criminal jurisdiction over Indian Reservations was tranferred from the Federal Government to certain states (California was included). The act (Public Law 280, act of August 15, 1953, ch. 505, § 2, 67 Stats. 588, 18 U.S.C.A. § 1162) provided that the State of California "(a) *** shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country**** to the same extent

that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, ** and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: ***(b) Nothing in this section *** shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The purpose of this legislation, which also included jurisdiction over civil causes of action, is set forth in House Report No. 848. The Legislature had two coordinate aims. "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." (1953 U.S. Code Cong. and Admin. News, p. 2409.) There was, in addition, a need for more effective law and order enforcement on Indian lands. "Need for such legislation on a general, rather than limited basis is grounded on the following: These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions. The applicability of Federal criminal laws in States having Indian reservations is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.

"As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility." (1953 U.S. Code Cong. and Admin. News, pp. 2411-2412.)

In compliance with the provisions of Public Law 280 prohibiting California from depriving Indians of any right, privilege or immunity afforded under federal statutes with respect to fishing or "the control, licensing, or regulation thereof," the state enacted Fish and Game Code, section 12300. This section provides that the provisions of the code are not applicable to "California Indians whose names are inscribed upon the tribal rolls, ***."

Prior to the passage of Public Law 280, California criminal laws were inapplicable to acts committed on Indian reservations by Indians or against Indians or property of Indians. (Donnelly v. United States, supra, 228 U.S. 243, 271-272, 33 S.Ct. 449, 57 L.Ed. 820; Williams v. United States, 327 U.S. 711, 714-715, 66 S.Ct. 778, 90 L.Ed. 962.) The state had the right to prosecute non-Indians for crimes committed against non-Indians, although such crimes occurred on Indian land. (United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869; Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419.) Included within the jurisdiction of the Federal Government prior to Public Law 280 was the authority to prevent unauthorized persons from fishing on Indian reservations.

In the early case of United States v. Sturgeon, 27 Fed. Cas. 1357, Case No. 16, 413, the court said: "The president had set apart the reservation for the use of the Pah Utes and other Indians residing thereon. He has done this by authority of law. We know that the lake was included in the reservation, that it might be a fishing ground for the Indians. The lines of the reservation have been drawn around it for the purpose of excluding white people from fishing there except by proper authority. It is plain that nothing of value to the Indians will be left of their reservation if all the whites who chose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law." (P. 1357.)

While the reasoning of the court in United States v. Strugeon, supra, relates to unauthorized use by non-Indians, it applies with equal force to Indians who are fishing on the Hoopa Reservation who are not members of the Hoopa Tribe and who have not been authorized by the Hoopa Tribe to fish on their reservation.

The general rule, in the absence of provisions to the contrary, is that the right of individual Indians to share in tribal property is dependent upon membership in the tribe. (Halbert v. United States, 283 U.S. 753, 762-763, 51 S.Ct. 615, 75 L.Ed. 1389.) It is assumed, for the purpose of this proceeding, that non-Hoopa Indians do not have fishing rights on the Hoopa Reservation and, therefore, come within the general rule of Halbert v. United States, supra. We do not decide for whom this reservation was created. That issue is not presently before this court.

We have concluded that the California legislation which enacted the immunity provision of the Fish and Game Code (§ 12300)

for Indians whose names were inscribed on the tribal rolls merely reiterated prior existing rights of tribal members. The State of California is not prohibited by federal law, past or present, from applying its fish and game laws to nontribal Indians or others who come upon the Hoopa Reservation without authorization and that therefore appellant is amenable to the provisions of that code.

Appellant, however, contends that the immunities reserved to the Hoopa Tribe by the Federal Government and granted by the State of California by Fish and Game Code, section 12300 apply to those persons (of which he is one) who have tribal authorization to fish on the reservation.

Although we find no express statute or cases as authority, we agree that such contention may be reasonably implied from both the Presidential Order of 1876 establishing the Hoopa Reservation and from Public Law 280 by which jurisdiction over this reservation was transferred from the Federal Government to California.

The Presidential Order of 1876, establishing the Hoopa Reservation, was "for Indian purposes." One of those purposes was the right to fish. When the Federal Government transferred the jurisdiction over Indians on Indian reservations to certain states by Public Law 280, it specifically provided that nothing in that section of the act shall deprive any tribal Indian of any right, privilege or immunity " with respect to *** fishing or the control, licensing, or regulation thereof." A reasonable construction of this language is that the tribe may control the fishing, including the licensing of non-Hoopa Indians to fish from streams on the reservation.

In Alaska Pacific Fisheries v. United States, 248,U.S. 78, 86, 39 S.Ct. 40, 63 L.Ed. 138, the United States sought to enjoin a California corporation from maintaining fish traps on water adjacent to Annette Island, an area designated for an Alaska Indian reservation. The court said: "The fish-trap was erected *** without the consent of the Indians or the Secretary of the Interior***" (P. 87, 39 S.Ct. p. 41;) The court, in granting the injunction preventing private persons or corporations from encroaching on territory reserved to Indians, implied that authority of such private corporation must emanate from the Indian tribe or the Secretary of the Interior. (See also Metlakatla Indian Community, Annette Islands Reserve v. Egan, 369 U.S. 45, 56-57, 82 S.Ct. 552, 7 L.Ed.2d 562 for the general proposition that 18 U.S.C.A. § 1162, protects rights given to Indians by statute respecting control and regulation of fishing on reservations.)

Similarly, the language of the provisions of 18 United States Code Annotated, section 1165, "Whoever, without lawful authority or permission *** goes upon any land[s] *** that are reserved for Indian use, for the purpose *** of fishing thereon, *** shall be fined ***" clearly indicates that tribal permission may be given to others to fish on their reservation. The section refers to fishing on land belonging to Indians or Indian tribes. Here the reservation belongs to the Hoopa Tribe by Presidential Order and the act of Congress of 1864.

Respondent contends that federal treaties and regulations dealing with Indians will not be deemed to preclude state jurisdiction in the absence of specific language compelling such a result. Respondent cites Puyallup Tribe v. Dept. of Game, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689, and Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573, in support of this contention. Neither case is applicable as each pertains

to state regulation of fishing on rivers located off the reservation. In fact, and contrary to respondent's contention, a more reasonable construction of Public Law 280 would require the state to point to an exception in the plain words of the statute which would authorize the state's interfering with the tribal right of "control, license or regulation" of fishing on the reservation. The argument that the licensin by the tribe of others to fish on the reservation is analogous to permitting the tribe to alienate the reservation property is not persuasive. Such argument ignores the all-inclusive wording of Public Law 280 which does not exclude permitting employing or licensing others to fish, and specifically prohibits the state from prohibiting its tribes licensing of fishing, hunting, trapping, etc.

It appears that the governmental policy is to encourage the tribal Indians to become self-sufficient in the development and commercial use of resources of the reservation. (See Skeem v. United States, 9 Cir., 273 F. 93, leasing of water rights; United States v. Powers, D.C., 16 F.Supp. 155, 164, leasing of Indian lands; "Water and Water Rights" by Robert Clark, Vol. 2, §145.1 p. 396; "Oil and Gas Leases" by Samuel H. Glassmire (2nd ed.), Indian lands and leases, §70, p. 270; "We Talk, You Listen" by Vine Deloria, Jr., for operation of tribal sawmills by Menominee Tribe of Wisconsin, pp. 153, 157.)

The prosecution of appellant also cannot be justified on the basis of the inherent reserved power of the state to subject individual's rights to reasonable regulation for the general welfare as in People v. Rhoades, 12 Cal.App.3d 720, 90 Cal.Rptr. 494. There the defendant was convicted of violation of Public Resources Code, section 4291 which required removal of flammable growth adjacent to

to a building on a reservation. Although defendant was an Indian and the premises were on Indian land, the safety of both Indian property and adjoining lands required that this police regulation be legitimately exercised.

The facts presently before us do not indicate the necessity for the legitimate exercise of police power, as in Rhoades. Fishing with a fish net (as here) is at most merely some interference with the recreation or sport of fishing. The federal statutory provisions prohibiting the state from interfering with tribal fishing rights were undoubtedly based on the practical reason that the Indian was not usually engaged in fishing as a sport but as a source of food. Consequently, fishing with gill nets, rather than rod and hook, in order to accomplish this fundamental purpose may be a necessity.

It is to be noted that Mr. Justice Douglas (a recognized conservationist) in Organized Village of Kake v. Egan, supra, 369 U.S. 60, 81, 82 S.Ct. 562, 7 .Ed. 2d 573, indicates that fishing with gill nets or hand lines is not condemned as is the use of fish traps. The State of California, in its blanket exemption of tribal Indians from the provisions of its fish and game laws, also did not deem it sufficiently important to except from its provisions in the interest of conservation the right of tribal Indians to fish with gill nets.[1]

---

1. This opinion is not intended to construe future jurisdiction of the federal government over the right to regulate fishing on the reservation. Congress may, of course, enact legislation limiting the right of the Indians' power to license others to fish on the reservation. Public Law 280 does not preclude this power. Likewise the state is

By reason of the foregoing, it is concluded that the State of California has jurisdiction to prosecute persons not members of the Hoopa Tribe for violation of its Fish and Game Code on the Hoopa Reservation. Further, that permission to fish on the reservation given by tribal authorities to non-tribal Indians is a complete defense to any such charge.

There is no evidence before us of the grant or licensing of appellant to fish on the Hoopa Reservation. That issue is for the trial court.

The order denying a petition for writ of prohibition is affirmed.

DRAPER, P.J., and CALDECOTT, JR., concur.

Footnote 1 continued.
not precluded from exercising its general police power under factual situations reasonably requiring the exercise of such power.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF HUMBOLDT

PAUL DONAHUE, Petitioner, vs. CALIFORNIA JUSTICE COURT FOR THE KLAMATH TRINITY JUDICIAL DISTRICT, Respondent. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	No. 49162 ORDER DENYING PETITION FOR WRIT OF PROHIBITION

Petitioner seeks to prohibit the Justice Court from proceeding in a criminal action on the grounds that the State of California has no jurisdiction to enforce its Fish and Game Laws against a non tribal Indian on the Hoopa Reservation. Section 1162 of the United States Code and the cases of Acosta vs County of San Diego, 126 CA 2nd 455,; Elser vs Gill Net Number One, 246 CA 2nd 30; and State ex rel. Nepstad vs Danielson, 427 P 2nd 689, indicate that the State does have jurisdiction.

The request for an alternative Writ is denied. Dated this 25th day of February, 1970.

D. H. Wilkinson
Judge of the Superior Court

APPENDIX C

JUSTICE COURT
KLAMATH TRINITY JUDICIAL DISTRICT
Hoopa, California

SSR 96
Esther B. Bradburn, Judge

P.O. Box 69B
Zip Code 95573

December 17, 1969

Mr. George F. Duke

California Indian Legal Services
2527 Dwight Way
Berkeley, California 94704

Attention: Robert Donavan
Lee J. Sclar

Dear Sir:

Re: Paul Donahue
Case #4779

The request for dismissal on Courts own Motion as to violations of sections 8603 of Fish and Game Code is hereby denied.

Mr. Donahue appeared in court and stated he had consulted you, Lee J. Sclar, and that he would enter a plea at this time.

Mr. Donahue appeared in open court and was arraigned and advised of his legal and constitutional rights. He entered a plea of not guilty to both of the above violations. He requested a Jury Trial, waived time. Trial set for March 6, 1970 at 9:00 A.M.

Mr. Donahue was released on a signed agreement to appear on the above date.

Sincerely yours,
Esther B. Bradburn, Judge
Klamath-Trinity Justice Cou

EBB:cq
cc:Wm. F. Ferroggiaro, Jr.

APPENDIX D

CLERK'S OFFICE SUPREME COURT
4250 State Building

San Francisco, California 94102

Apr 29 1971

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 1 Civil No. 28294

Donahue

vs

Justice Court, Klamath

Respectfully,

G.E. Bishel
Clerk

APPENDIX E

California Fish & Game Code §8603

It is unlawful to use or operate or assist in using or operating any net, trap, line, spear, or appliance, other than in connection with angling, in taking fish, except as provided in this chapter or Chapter 4 of this part.

California Fish & Game Code §8686

In District 1 1/2, 2 1/2, and in the Trinity and Klamath River District, it is unlawful to possess any gill or trammel net with meshes over 1 3/4 inches in length, except under regulations which may be prescribed by the commission.

California Fish & Game Code §12300

Irrespective of any other provision of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

No such Indian shall be prosecuted for the violation of any provision of this code occurring in the places and under the circumstances hereinabove referred to. Nothing in this section, however, prohibits or restricts the prosecution of any Indian for the violation of any provision of this code prohibiting the sale of any bird, mammal, fish, or amphibia.

18 U.S.C. §1162 (67 Stat. 588)

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band,

or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-138

PAUL DONAHUE, *Petitioner,*

VS.

CALIFORNIA JUSTICE COURT FOR THE KLAMATH-TRINITY JUDICIAL DISTRICT, *Respondent,*

THE PEOPLE OF THE STATE OF CALIFORNIA, *Real Party in Interest.*

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Court of Appeal, entered February 24, 1971, is reported at 15 Cal.App.3d 557; the modification of the opinion, entered March 26, 1971, is reported at 16 Cal.App.3d 244(a). The opinion as modified is also reported in 93 Cal.Rptr. 310.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Does California have jurisdiction to prosecute violations of its fish and game laws committed on an Indian reservation by a person who is not a member of the reservation tribe?

2. Does a person who is not a member of the Hoopa Tribe have standing to assert that California's enforcement of its fish and game laws on the Hoopa reservation infringes upon the fishing rights of that tribe?

STATEMENT OF THE CASE

By a complaint filed September 8, 1969, in the Justice Court for the Klamath-Trinity Judicial District of Humboldt County, petitioner Paul Franklin Donahue was charged with violating Fish and Game Code section 8603, in that he operated a gill net on the Trinity River, and with violating Fish and Game Code section 8686 in that he possessed a gill net with mesh larger than 1¾ inches in a prohibited district.

By a letter memorandum dated December 9, 1969, appellant requested the Justice Court to dismiss the complaint on the ground that the court had no jurisdiction over the alleged offense, which took place on the Hoopa Valley Indian Reservation. Appellant's request for dismissal was denied December 17, 1969.

On February 10, 1970, petitioner filed in the Humboldt County Superior Court an application for a writ of prohibition to restrain his prosecution on the above-described charges. By an order filed February

27, 1970, the Superior Court denied the petition. Notice of appeal was filed by petitioner on March 2, 1970.

On February 24, 1971, the California Court of Appeal affirmed the action of the Superior Court denying a writ of prohibition to halt the prosecution. Both sides petitioned for rehearing and modification, and the opinion was modified on March 26, 1971. A petition for hearing in the California Supreme Court was denied April 29, 1971.

STATEMENT OF FACTS

The facts of this case, which are derived from the uncontradicted allegations of petitioner's pleadings in the Superior Court, may be simply stated: Petitioner Paul Donahue is a California Indian, although he is not a member of the Hoopa Valley Tribe. On September 6, 1969, petitioner was fishing on that section of the Trinity River which flows through the Hoopa Valley Indian Reservation. The complaint alleges that he was fishing with a gill net with mesh larger than 1¾ inches. This conduct, if proven, violated sections 8603 and 8686 of the California Fish and Game Code.

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JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

Public Law 280 confers upon the California courts jurisdiction to prosecute violations of state law committed on an Indian Reservation except where such prosecutions would infringe upon rights previously granted by federal statute, agreement or treaty with the Indians. To the extent that the Hoopa Tribe has been granted fishing rights on the Hoopa Reservation, petitioner has failed to show how prosecuting a non-tribal member for violation of the state laws regulating fishing infringes upon the fishing rights of the Hoopa Tribe. Finally, petitioner is not a member of the Hoopa Tribe and has no standing to assert tribal rights.

ARGUMENT

I

BY VIRTUE OF PUBLIC LAW 280 CALIFORNIA HAS JURISDICTION TO PROSECUTE VIOLATIONS OF ITS FISH AND GAME LAWS ON THE HOOPA INDIAN RESERVATION

In contending that the state is without jurisdiction to try him for an offense committed on an Indian Reservation, appellant is first confronted with the provisions of Title 18, United States Code section 1162, which is part of Public Law 280. That section provides, in material part, as follows:

> "(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name

of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
. . . .	. . . .
"California	All Indian country within the State
. . . .	. . . .

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

In response to this legislation, California enacted section 12300 of the Fish and Game Code. That states:

"Irrespective of any other provision of law, the provisions of this [Fish and Game] code are not applicable to California Indians whose names are inscribed upon the tribal rolls, under those places

> and circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, Eighty-third Congress of the United States.
>
> "No such Indian shall be prosecuted for the violation of any provision of this code occurring in the places and under the circumstances hereinabove referred to. Nothing in this section, however, prohibits or restricts the prosecution of any Indian for the violation of any provision of this code prohibiting the sale of any bird, mammal, fish, or amphibia."

That section, in effect, conferred an immunity on tribal Indians when hunting and fishing on their tribal reservation. Appellant cannot and does not claim immunity under Fish and Game Code section 12300, because he concedes that his name is not inscribed upon the tribal roll of the Hoopa Valley Tribe. However, he does assert a lack of state jurisdiction purportedly deriving from Title 18, United States Code section 1162(b), *i.e.*,

> "Nothing in this section . . . shall deprive any Indian or Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control licensing or regulation thereof."

Appellant's argument is premised on the notion that the Hoopa Valley Indian Reservation is a separate entity. This motion is unsound. Indian reservations have always been treated as geographically, politically and governmentally within the boundaries of

the state wherein they are located except to the extent that Congress has expressly provided otherwise. See *Acosta v. County of San Diego,* 126 Cal.App.2d 455, 563, 272 P.2d 92 (1954). And, "in unambiguous, terms, Public Law 280 withdrew federal jurisdiction over offenses committed in specified areas of Indian country by the grant of exclusive criminal jurisdiction to five designated states [including California]." *Anderson v. Gladden,* 293 F.2d 463, 466 (9th Cir. 1961); see also *People v. Rhoades,* 12 Cal.App.3d 720, 90 Cal. Rptr. 794 (1970), *cert. den.* 40 U.S.L.W. 3162 (Oct. 12, 1971).

The thrust of petitioner's argument seems to be this: that despite the state's grant to tribal Indians of immunity from prosecution for fish and game law violations, to prosecute someone who is not a Hoopa Indian for fishing on the Hoopa Reservation in a manner violative of California law as well as sound conservation practice, infringes upon the fishing rights of the Hoopa Valley Tribe. As thus stated the argument is absurd on its face.

Although petitioner does not clearly say so, his petition implies that the exercise of state criminal jurisdiction over non-tribal members would restrict the power of the Hoopa Tribe to enforce its fishing rights. This implication is wrong. The California courts have long been open to civil actions brought to vindicate private fishing rights. *Pacific etc. v. Packers' Assn.,* 138 Cal. 632, 72 Pac. 161 (1903); *Heckman v. Swett,* 107 Cal. 276, 40 Pac. 420 (1895). And by of Title 28, United States Code section 1360, the Hoopa Tribe may bring a civil action in the California courts for the infringe-

ment of its reservation fishing rights. California's exercise of criminal jurisdiction to prosecute persons other than tribal members for fishing law violations on the reservation in no way infringes upon the fishing rights of the Hoopa Tribe. To the contrary, it protects and enhances them, and petitioner's assertions otherwise are without merit.

II

PETITIONER LACKS STANDING TO ASSERT THE FISHING RIGHTS OF THE HOOPA TRIBE

Petitioner's application to this Court concludes with a plea that it "uphold the integrity of Indian reservations by granting this petition and reversing the decision of the California Court of Appeal." Pet. for Cert., p. 7. However, in documents filed in the California Court of Appeal, petitioner stated that he assumed for purposes of argument that as one not enrolled in the Hoopa Valley Tribe, he had no right to fish on the Hoopa Valley Reservation. Pet. for Modification and Reh., p. 1; Appellant's Reply Brief, p. 4 f.n. 2. His assumption in the Court of Appeal was unquestionably correct, for under Federal law, membership in a tribe is a prerequisite to the right to share in tribal property. *Halbert v. United States*, 283 U.S. 753, 762-63 (1931); Cohen, Handbook of Indian Law (1942), p. 185. Moreover, the Department of the Interior has consistently interpreted the presidential order setting aside the Hoopa Valley Reservation (Kappler, Indian Laws and Treaties, Vol. 1, p. 815 [1903]), as vesting property rights exclusively

in those Indians possessing membership in the Hoopa Valley Tribe. See, Rights of Indians in Hoopa Valley Reservation, California, 65 I.D. 59 (1958).[1] Of course, petitioner cannot represent before this Court a class of which he is not a part. See *Paul v. Beals,* 396 U.S. 45, 49 (1969); *Bailey v. Patterson,* 369 U.S. 31, 32-33 (1962); *New York ex rel. Cutler v. Dibble,* 21 How. 366, 371 (1858). Thus, petitioner's lack of standing is plain and, for purposes of this forum, conclusive.[2]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 27, 1971.

EVELLE J. YOUNGER,
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[1]Citation is to the published reports entitled, "Decisions of the United States Department of Interior."

[2]As a practical matter, it is significant that the Hoopa Tribe, though aware of the opinion of the Court of Appeal, has declined to become involved in this litigation either by way of petition to the California appellate courts or to this Court. A fair conclusion to be drawn from this is that the tribe simply does not feel itself aggrieved by the prosecution of petitioner. Moreover, the fact that a decision by this Court allowing petitioner to violate the fish and game laws with immunity might have an adverse effect on the fishing rights of the Hoopa Tribe, is itself an additional reason for declining to entertain this petition.